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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 656

HOUSTON AND NORTH TEXAS MOTOR FREIGHT LINES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 1. 129–134)[1] is reported at 193 F. 2d 394. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R 1. 63–120) are reported at 88 N. L. R. B. 1462.

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[1] As in the Petition, the symbol "R 1" refers to the printed transcript of record in the court below, the symbol "R 2" to the appendix to the brief of petitioner in the court below, and "R 3" to the appendix to brief of respondent below.

JURISDICTION

The judgment of the court below was entered on December 28, 1951 (R 1. 135). A petition for rehearing was denied on January 24, 1952 (R 1. 150). The petition for a writ of certiorari was filed on March 15, 1952. The jurisdiction of this Court is invoked under 28 U. S. C. 1254, and under Section 10 (e) and (f) of the National Labor Relations Act, as amended.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. IV, 151 *et seq.*), appear in the Appendix to the Petition, pp. 17–35.

QUESTIONS PRESENTED

1. Section 9 (d) of the Act requires that when a Board order in an unfair labor practice case is based upon facts certified in a representation proceeding, the record in the latter proceeding shall be included when the record in the unfair labor practice proceeding is filed in the court of appeals. The only question squarely presented (Question No. 4 in the Petition, pp. 3–4) is whether, when the Board has dismissed a representation proceeding and has not based its order remedying unfair labor practices upon any facts certified therein, the record in that proceeding must nevertheless be filed together with the record in the unfair labor practice proceeding.

2. The remaining questions stated in the Petition (p. 3) are all directed to the question whether the Board properly dismissed the representation proceeding. For reasons stated *infra*, pp. 6–7, we believe that this question is not presented in this proceeding.

STATEMENT

Following the usual proceedings under the Act the Board found that in June and July 1948 petitioner, in countering an organizational campaign conducted by the Union,[2] violated Section 8 (a) (1) of the Act by numerous acts of interference, restraint, and coercion; violated Section 8 (a) (5) by refusing to bargain with the Union after it attained the status of majority representative; and violated Section 8 (a) (3) by discriminatorily discharging or refusing to reinstate six employees (R 1. 65–70, 83–114). The court below held that except in the case of one of the alleged discriminatees (as to whom the Board does not seek review), the Board's findings, conclusion, and order were valid (R 1. 129–134). The petition for certiorari in no way challenges the Board's findings and conclusions, but is concerned solely with the Board's dismissal of a petition for an election filed by petitioner under Section 9 (c) (1) (B) of the Act.

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[2] Dallas General Drivers Warehousemen and Helpers, Local 745, International Brotherhood of Teamsters, A. F. L.

The petition in question was filed with the Regional Director of the Board on July 6, 1948, after the commission of most of the unfair labor practices summarized above (R 2. 128–129). In effect the petition alleged that a question had arisen as to whether the Union represented petitioner's office employees, and that an election should be held to resolve the question (*ibid.*, see also Section 9 (c) (1) of the Act). Six days thereafter the Union filed unfair labor practice charges, alleging the violations subsequently found by the Board (R 1. 9–12). The Regional Director refused to issue a Notice of Hearing on the July 6 representation petition, and the Board sustained his action on the ground that further proceedings on the petition were "precluded because of the pendency of unfair labor practice charges * * *" (Pet., p. 5).

The court below held that the Board acted "well within its discretion" in dismissing the representation proceeding (R 1. 131). The court, noting further that when the Board dismissed the representation proceeding "it made no certification of any facts and obviously the order in the instant [unfair labor practice] case is in no way based upon any facts certified in any section 9 (c) proceeding," concluded that "There is, therefore, nothing concerning the representation proceeding properly before this court" (R 1. 131).

ARGUMENT

1. Section 9 (d) of the Act (Pet., p. 25) provides that whenever an order of the Board in an unfair labor practice proceeding is "based in whole or in part upon facts certified" in a representation proceeding, the record in the representation proceeding shall form part of the record reviewed by the court of appeals in the unfair labor practice proceeding. As the court below correctly observed, the Board in dismissing the representation proceeding "made no certification of any facts and obviously the order in the instant case is in no way based upon any facts certified in any section 9 (c) [representation] proceeding" (R 1. 131). It follows that the record in the representation proceeding was properly excluded from the record in the instant case. See *National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453, 459; *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401, 406–407, 408–409.[3] Moreover, inclusion in this case of the "record" in the representation proceeding—which consisted solely of the petition (introduced in evidence in the unfair labor practice case, R 2. 128–129), its dismissal by the Regional Director, the Company's request for review, and the Board's affirmance of the

[3] The Taft-Hartley amendments made no material change in the original Act in this respect. See *Fitzgerald* v. *Douds*, 167 F. 2d 714, 716–717, esp. n. 3 (C. A. 2).

Director—would plainly not have altered the result in the unfair labor practice proceeding.

2. Even assuming that the Board erred in dismissing the representation proceeding, and that its action is subject to judicial review, the proceeding forms no part of the record in this case; consequently, the propriety of the Board's action in the representation proceeding cannot be placed in issue in the unfair labor practice proceeding, either in the court below or on review by this Court.

In any event, the Board's action in dismissing the representation proceeding because of the pendency of the unfair labor practice charges was manifestly correct, and *a fortiori* not an abuse of the Board's "wide discretion in determining the procedure necessary to insure the fair and free choice of bargaining representatives by employees."[4] Since the pending unfair labor practice charges alleged an unlawful refusal to bargain with the Union, a decision in the unfair labor practice case sustaining that charge would necessarily have resulted in an order to bargain, regardless of the outcome of the election which petitioner sought in the representation proceed-

[4] *Southern S. S. Co.* v. *National Labor Relations Board*, 316 U. S. 31, 37; see also *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U. S. 206, 226; *National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453, 458; *National Labor Relations Board* v. *A. J. Tower Co.*, 329 U. S. 324, 330.

ing. *Franks Bros. Co.* v. *National Labor Relations Board,* 321 U. S. 702, 704–705, and other cases cited at pp. 7–8, Brief in Opposition, *Poole Foundry and Machine Co.* v. *National Labor Relations Board,* certiorari denied, No. 563, this Term. Since the holding of the election would have been a useless act, the Board properly followed its customary, and judicially approved, course of declining to proceed further with the representation case because of the pendency of the unfair labor practice case. *Kansas City P. & L. Co.* v. *National Labor Relations Board,* 111 F. 2d 340, 358 (C. A. 8); *Warehousemen's Union* v. *National Labor Relations Board,* 121 F. 2d 84, 94 (C. A. D. C.), certiorari denied, 314 U. S. 674; *National Labor Relations Board* v. *Auburn Foundry, Inc.,* 119 F. 2d 331, 334 (C. A. 7).[5] Contrary to petitioner's contention, nothing in the 1947 amendments imposed a mandatory duty upon the Board to proceed in the representation case when to do so would only result in an election which the Board itself would thereafter properly set aside. Cf. *Herzog* v. *Parsons,* 181 F. 2d 781 (C. A. D. C.), certiorari denied, 340 U. S. 810.

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[5] *Continental Southern Corp.*, 83 N. L. R. B. 668, relied on by petitioner (Pet. 10–11) is manifestly inapposite; no unfair labor practice charges were filed in that case.

CONCLUSION

The decision of the court below is plainly correct and presents neither a conflict of decisions nor any important question warranting review. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL, 1952.

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